

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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PUBLIC EMPLOYMENT  
RELATIONS BOARD

MICHAEL E. FROST,  
Appellant,

and

STATE OF IOWA (DEPARTMENT OF  
ADMINISTRATIVE SERVICES),  
Appellee.

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) CASE NO. 07-MA-04  
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DECISION ON REVIEW

This matter is before us on appeal of a Proposed Decision and Order issued by an administrative law judge (ALJ) of the Public Employment Relations Board (PERB or Board) in which the ALJ proposed that the above-captioned State employee grievance appeal be dismissed. The Appellant timely sought our review of the ALJ's proposed decision pursuant to PERB rule 621-11.8.

Pursuant to PERB subrule 621-9.2(3), we have considered the case upon the record submitted before the ALJ. Briefs were submitted by each party to the Board on review. Based upon the review of the record and having considered the briefs of the parties, we make the following findings of fact and conclusions of law:

FINDINGS OF FACT

The findings of fact set out in the ALJ's Proposed Decision and Order (attached hereto as "Appendix A") were stipulated by the parties. We hereby adopt the ALJ's findings of fact as our

own and they are, by this reference, incorporated herein and made a part hereof as though fully set forth.

#### CONCLUSIONS OF LAW

The conclusions of law in the ALJ's Proposed Decision and Order are correct and we hereby adopt them as our own and they are, by this reference, incorporated herein and made a part hereof as though fully set forth, with the following additional discussion:

The ALJ correctly determined that the intent or purpose of the subrule at issue has been fulfilled and substantial compliance with it achieved by the State where Frost received notice of his appeal rights (although not that precisely specified by the subrule) and in fact exercised them. Frost argues on review that this result will excuse the State from ever strictly complying with the subrule to the potential detriment of future grievants who may remain ignorant of their appeal rights and fail to timely exercise them.

However, as the ALJ noted, what constitutes substantial compliance with a statute or administrative rule is a matter depending on the facts of each particular case. See Appendix A at p. 5. Our decision does not address a situation where a grievant has failed to appeal due to a defective notice, or any facts other than those presently before us.


Accordingly, we hereby enter the following:

ORDER

The state employee grievance appeal of Michel E. Frost is hereby DISMISSED.

DATED at Des Moines, Iowa, this 22nd day of September, 2008.

PUBLIC EMPLOYMENT RELATIONS BOARD

  
James R. Riordan, Chair

  
M. Sue Warner, Board Member

  
Neil A. Barrick, Board Member

File original.

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APPENDIX A  
STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL E. FROST,  
Appellant,

and

STATE OF IOWA (DEPARTMENT OF  
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PROPOSED DECISION AND ORDER

Michael E. Frost filed this State employee grievance appeal with the Public Employment Relations Board (PERB or Board) on June 20, 2007, pursuant to Iowa Code section 8A 415(1). Frost's grievance appeal challenges the sufficiency of a disciplinary notice issued by the Iowa Department of Administrative Services (State or DAS). Frost contends that the notice failed to substantially comply with DAS subrule 11-60.2(1), paragraph b, and subrules 11-60 2(6) and 11-61 2(6). Frost appealed the merits of the disciplinary action in a separate action, which is currently pending with PERB.

In this appeal, Frost moved for summary judgment and the State filed a motion to dismiss in conjunction with its answer. On February 12, 2007, the parties filed a joint withdrawal of their respective motions and a waiver of hearing with submission of stipulated facts, pursuant to Iowa Code section 17A.10A. Submissions were made by Michael E. Frost, pro se, and Michael

Prey and Robert Porter for the State. Both parties submitted written briefs.

#### FINDINGS OF FACT

The stipulated facts are as follows:

On April 17, 2007, Appellant's supervisor, Mary Ann Hills, issued Appellant a one-day "paper" suspension. Whether Appellee had just cause for such action within the meaning of Iowa Code section 8A.415(1) is at issue in a separate PERB proceeding, Case No. 07-MA-03.<sup>1</sup>

In conjunction with the one-day "paper" suspension imposed, Hills presented Appellant with a document which advised him of the suspension, its duration and the reasons for it. The only reference in the document to Appellant's right to appeal the disciplinary action was its final sentence, which provided: "You may file a grievance in accordance with Chapter 61 of the Department of Administrative Services-Human Resource Enterprise rules." This was the only document Appellee presented or sent to Appellant which stated the reasons for and duration of the suspension.

Appellant subsequently filed a timely appeal of the suspension with the DAS director in accordance with DAS subrule 11-61.2(6).

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<sup>1</sup> Appellant filed his appeal of the suspension pursuant to Iowa Code section 8A.415(2) rather than section 8A.415(1) as indicated in the stipulation.

## CONCLUSIONS OF LAW

Pursuant to Iowa Code section 8A.415(1), for state employee grievance appeals, PERB's decision "shall be based upon a standard of substantial compliance with this subchapter [subchapter IV of chapter 8A] and the rules of the department [of Administrative Services]." Under this standard, for an employee to prevail in a grievance appeal before PERB, he or she must establish a lack of substantial compliance by the State with chapter 8A or DAS rules. See, e.g., *Stratton and State of Iowa*, 93-MA-13 (PERB 1995); *Taylor and State of Iowa*, 92-MA-08 (PERB 1994).

Frost contends that the State failed to substantially comply with DAS subrule 11-60.2(1), paragraph b, and subrules 11-60.2(6) and 11-61.2(6) when the written notice of the one-day suspension did not include the verbatim content of DAS subrule 11-61.2(6). The absence of this content is the basis for the rule violations Frost alleges.

The relevant DAS subrules provide:

**60.2(1) Suspension.**

. . . .

b. *Disciplinary suspension.* An appointing authority may suspend an employee for a length of time considered appropriate not to exceed 30 calendar days as provided in either subparagraph (1) or (2) below. A written statement of the reasons for the suspension and its duration shall be sent to the employee within 24 hours after the effective date of the action.

(1) Employees who are covered by the premium overtime provisions of the federal Fair Labor Standards Act may be suspended without pay.

(2) Employees who are exempt from the premium overtime provisions of the federal Fair Labor Standards Act will not be subject to suspension without pay except for infractions of safety rules of major significance, and then only after the appointing authority receives prior approval from the director. Otherwise, when a suspension is imposed on such an employee, it shall be with pay and shall carry the same weight as a suspension without pay for purposes of progressive discipline. The employee will perform work during a period of suspension with pay unless the appointing authority determines that safety, morale, or other considerations warrant that the employee not report to work.

**60.2(6)** Appeal of a suspension, reduction of pay within the same pay grade, disciplinary demotion or discharge shall be in accordance with 11-Chapter 61. The written statement to the employee of the reasons for the discipline shall include the verbatim content of 11-subrule 61.2(6).

**61.2(6)** *Appeal of disciplinary actions.* Any nontemporary, noncontract employee covered by merit system provisions who is suspended, reduced in pay within the same pay grade, disciplinarily demoted, or discharged, except during the employee's period of probationary status, shall bypass steps one and two of the grievance procedure provided for in rule 11-61.1(8A) and may file an appeal in writing to the director for a review of the action within 7 calendar days after the effective date of the action. The appeal shall be on the forms prescribed by the director. The director shall affirm, modify or reverse the action and shall give a written decision to the employee within 30 calendar days after the receipt of the appeal. The time may be extended by mutual agreement of the parties. If not satisfied with the decision of the director, the employee may request an appeal hearing before the public employment relations board as provided in 11-subrule 61.2(5).

While Frost is correct that the subrules all generally relate to his suspension, only DAS subrule 11-60.2(6) contains a requirement relevant to the alleged deficiency of the notice.

Subrule 11-60.2(1), paragraph b, and subrule 11-61.2(6) do not require the inclusion of subrule 11-61.2(6) in the written notice. With respect to the requirements of these two subrules, the record does not establish the State's failure to comply.

It is clear that the State did not literally comply with subrule 11-60.2(6). The State's written notice of the one-day suspension to Frost does not contain the verbatim content of DAS subrule 11-61.2(6), as required by DAS subrule 11-60.2(6). However, literal compliance is not the issue. The question is whether the State substantially complied with DAS subrule 11-60.2(6). The Iowa Supreme Court has indicated the definition of substantial compliance as follows:

"[s]ubstantial compliance" with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

*Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988).

The definition is appropriate in Iowa Code section 8A.415(1) determinations because principles of statutory construction also apply to the construction and interpretation of administrative rules. See, e.g., *Steinbronn v. State of Iowa*

(DHS), 06-MA-07 (PERB 2008)(citing *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003)).

The substantial compliance standard is more comprehensive than the limited inquiry advanced by Frost. Substantial compliance depends on the facts of each case to determine whether the actions taken meet the objective of the statute or rule. In this appeal, the determination is whether the written notice issued met the objective of subrule 11-60.2(6) under the facts of this particular case.

In viewing subrule 11-60.2(6), its objective is to ensure that a state employee receives reasonable notice of his or her right to appeal disciplinary action under chapter 61 of the DAS rules. That the content of the notice sufficiently informs a disciplined employee of this right is essential to meeting the objective. However, the specific inclusion of DAS subrule 11-61.2(6) is not essential to accomplish the objective of reasonable notice. The content of the notice, without inclusion of DAS subrule 11-61.2(6), can still convey the necessary information, as intended by subrule 11-60.2(6).

The State provided reasonable notice to Frost in a content that sufficiently informed him of his appeal rights. It served the objective of subrule 11-60.2(6). The notice provided, "You may file a grievance in accordance with Chapter 61 of the Department of Administrative Services-Human Resource Enterprise

rules." As intended by the subrule, the content informed Frost of his right to appeal the suspension. It was not incorrect, or misleading, or ambiguous. With certainty, it alerted Frost to the applicable process, chapter 61, to follow should he wish to appeal. Chapter 61, "Grievances and Appeals," contains the administrative rules which set forth and describe grievances and the appeal procedure. By identifying chapter 61 as the appeal process, Frost was sufficiently informed. He was not left to second-guess the existence of a process or its location within the administrative rules. The notice provided the information necessary for Frost to challenge his disciplinary action.

In this case, the effect of the notice was not diminished by the State's failure to include the word-for-word content of subrule 11-61.2(6). Contrary to Frost's position, eliminating the employee's need to consult chapter 61 is not the intended objective of subrule 11-60.2(6). With or without the content of subrule 11-61.2(6) in the notice, outside reference to chapter 61 is a necessary part of the appeal process. This is especially so where DAS rule 11-61.1(8A) provides information as to the contents of the grievance and subrule 11-61.1(4) covers grievance meetings, including the right to representation and the right to meet during work hours. The intent of the notice, under subrule 11-60.2(6), is not to serve as a substitute for chapter 61 and the information contained therein.

Frost surmises a missed appeal deadline or other prejudice will result from the absence of the verbatim content of subrule 11-61.2(6) in the notice. Substantial compliance requires a look at the action taken and its actual effect rather than conjecture of possible outcomes. Frost is correct that inherent in subrule 11-60.2(6) is the intent that the State provides notice in a manner that allows employees an opportunity to appeal. In this regard, the State followed the requirement of the subrule. The notice was timely when it was included in the written statement of disciplinary reasons issued to Frost.

The record shows that the purpose of the rule was served. Pursuant to chapter 61, Frost timely appealed his suspension after receipt of the notice issued by the State. This reflects the fact that the State's notice served the primary purpose of subrule 11-60.2(6). The notice sufficiently informed Frost in a manner that he availed himself of the process.

Finally, Frost contends a remedy is warranted because this is the second case where the State issued a notice without the language of subrule 11-61.2(6).<sup>2</sup> Frost's frustration with the State's continued failure to strictly comply is understandable. Nevertheless, literal or strict compliance is not the issue in

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<sup>2</sup>In *Stockbridge v. State of Iowa (DOC)*, 06-MA-06 (ALJ 2007), the State failed to include the verbatim content of subrule 11-61.2(6) in its notice of discharge to Stockbridge. The relevant notice provided, "Your discharge may be appealed within 14 calendar days of your dismissal as per the Iowa Administrative Rule." Nonetheless, the ALJ provided no relief after concluding that Stockbridge had every opportunity to appeal and, in fact, did appeal.


section 8A.415(1) determinations. The question is whether there was substantial compliance, which depends on the facts of each case.

The State's notice meets the objective of DAS subrule 11-60.2(6). It alerted Frost to his right to appeal the suspension and the process to follow under chapter 61. Because in this case the notice met the objective of subrule 60.2(6), the State substantially complied with this subrule.

Although Frost has established the State's failure to strictly or literally comply with subrule 11-60.2(6), he has failed to show a lack of substantial compliance with that or any other rule provision he has cited. Accordingly, I propose entry of the following order:

The state employee grievance appeal of Michael E. Frost is hereby DISMISSED.

DATED at Des Moines, Iowa, this 29th day of May, 2008.

  
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Diana S. Richeson  
Administrative Law Judge

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